Supreme Court No. 75934-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

HEATHER ANDERSEN and LESLIE CHRISTIAN *et al.*, Respondents,
v.
KING COUNTY *et al.*, Appellants.

Appeal from the Superior Court of King County
The Honorable William L. Downing

CELIA CASTLE and BRENDA BAUER *et al.*, Respondents,
v
STATE OF WASHINGTON, Appellant.

Appeal from the Superior Court of Thurston County
The Honorable Richard D. Hicks

AMICI CURIAE BRIEF OF LABOR ORGANIZATIONS

American Federation of Teachers,Washington; Asian Pacific American Labor Alliance, Seattle Chapter; Coalition of Labor Union Women, Puget Sound Chapter; Communication Workers of America, Local 7800; Inland Boatman's Union of the Pacific; International Alliance of Theatrical Stage Employees, Local 15; International Federation of Professional and Technical Engineers, Local 17; International Union of Operating Engineers, Local 609; King County Labor Council; The Northwest Labor and Employment Law Office; Out Front Labor Coalition; Pride at Work; Seattle Community College Federation of Teachers, AFT 1789; Seattle Musicians' Association, Local 76-493; Service Employees International Union, Local 6; Service Employees International Union, Local 775; Service Employees International Union, Local 925; Service Employees International Union, Local 1199; Service Employees International Union - Washington State Council; United Farm Workers, Pacific NW; United Auto Workers 4121; Washington Legal Workers; Washington State Nurses Association; WashTech, CWA Local 37083

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici,[1] as well as other labor organizations, are democratic associations seeking to further the collective and individual good of their members. Labor unions and their members have followed the trajectory of clearer understanding and application of liberty and equality along with the rest of America. Sometimes they have lagged behind and sometimes led the charge for realizing those ideals. In both situations union members have experienced and observed the struggles of women, racial minorities and immigrants to achieve the liberty to be different, and for meaningful equality in their workplaces and in their communities.[2] Those struggles continue, as does the struggle to defeat heterosexism and allow gay and lesbian[3] workers the liberty that comes from acceptance and the equality that comes with fair treatment.[4] Since 1974 when union bus drivers

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[1] This brief's appendix contains a short description of each amicus curiae labor organization.

[2] See *e.g.*, Kent Wong's short history of racism within the labor movement, the progress in defeating it and on labor's efforts to defeat homophobia in *Toward A Gay-Labor Alliance* in OUT AT WORK (ed. Kitty Krupat and Patrick McCreery, University of Minnesota Press 2001)[hereinafter OUT AT WORK] 240-246. Mr. Wong was the founding President of the Asian Pacific American Labor Alliance. *Id.*

[3] For convenience, *Amici* use the terms "lesbian" and "gay" to refer to all individuals who identify as lesbian, gay, bisexual, transgender, or who are perceived by others as such and who may therefore experience discrimination because of that perception.

[4] *See generally*, John J. Sweeney, *The Growing Alliance between Gay and Union Activists* in OUT AT WORK 24-30. Mr. Sweeney is President of the American Federation of Labor and Congress of Industrial Organizations, a federation of 58 national and

bargained the first contractual ban on sexual orientation discrimination[5] to the filing of this brief, unions have used their collective bargaining power,[6] and their existence as communities,[7] to support gay and lesbian workers' demand for justice.

The path to understanding the role of lesbian and gay workers within union democracy has been an uneven road, one that exposed the common denigration of homosexuality, and the ostracizing of those who identify themselves as gay. That road has also demonstrated the power of legitimacy and acceptance of lesbians and gays to promote equality and

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international labor unions representing 13 million working women and men. *See* http://www.aflcio.org/aboutaflcio/about/thisis/index.cfm (last viewed 2/5/05)

[5] Sweeney. *Supra* at 26. In 1982, United Auto Workers District 65 won the first domestic partnership health insurance benefit for employees whose "spousal equivalent" was of the same sex. Miriam Frank, *Lesbian and Gay Caucuses in the U.S. Labor Movement* in LABORING FOR RIGHTS: UNIONS AND SEXUAL DIVERSITY ACROSS NATIONS (ed. Gerald Hunt, Temple University Press, Philadelphia, 1999) [herinafter LABORING FOR RIGHTS] 91. Kitty Krupat describes the fight for this historic precedent in *Out of Labor's Dark Age: Sexual Politic Comes to the Workplace* in OUT AT WORK 9-11.

[6] "The original partner benefits victories were possible because the labor movement had the power to force insurance funds or companies to experiment with coverage they were actively trying to avoid." Desma Holcomb, *Domestic Partner Health Benefits: The Corporate Model vs. The Union Model* in LABORING FOR RIGHTS at 103-120. Early exercise of that bargaining power attained partner benefits in Berkley, West Hollywood, San Francisco and Seattle. *Id.* at 110. These and other municipalities' years of actuarial experience demonstrated the affordability of domestic partner benefits to private sector employers. *Id* at 112.

[7] Labor's organizing strategies "are not just economically based. They are very specific, long-term, community building strategies. They're based on a[n] understanding about immigration, gender, and race—and not just as black or Latino, but also as South Asian and African." Amber Hollibaugh and Nikhil Pal Singh, *Sexuality, Labor, and the New Trade Unionism: A Conversation* in OUT AT WORK 61.

liberty.[8] The link between that acceptance and the increased autonomy of gay and lesbian members and the revitalization of union democracy for all members is well documented.[9]

Amici have experienced the enhanced individual liberty and democracy that derives from acknowledgement of the full humanity of their gay and lesbian members and of the legitimacy of the relationships and families they form. They appear before this Court to urge recognition of plaintiffs' relationships as civil marriages unburdened by the hatred, fear and state-sanctioned disapproval that perpetuates stigma and seeks to confine plaintiffs to outmoded, unconstitutional gender roles, and our society to a restricted visionless semi-democracy.

STATEMENT OF ISSUES AND OF THE CASE

Amici adopt plaintiffs' statements of the issues and of the facts.

ARGUMENT

I. PLAINTIFFS' CALLS FOR LIBERTY AND EQUALITY ARE PROTECTED BY THE VITALITY OF THE PRINCIPLES EMBODIED IN THE WASHINGTON CONSTITUTION.

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[8] For telling descriptions of the harm caused by *de jure* discrimination against gays and lesbians and the denigrating workplace stereotyping that the law reinforces, and for a vibrant description of the path for justice and acceptance within the labor movement, *see generally* OUT AT WORK and Frank, *supra*, at 87-102.

[9] *See e.g.*, Frank, *supra*; Teresa Conrow, *Being a Lesbian Trade Unionist: The Intersection of Movements* in OUT AT WORK at 133-149.

Each plaintiff couple before this Court has established a relationship that embodies the substance and form of any other relationship licensed by the State as a civil marriage. Yet the State denies each couple's relationship the recognition, respect, support and protection given to identical relationships licensed as marriages.[10] The plaintiffs' right to form an intimate relationship is intrinsic to their existence as human beings in a civil society. State recognition of their public commitment as marriage is fundamental to their participation in our constitutional democracy. As such, the right to form the intimate relationship legally recognized as a civil marriage is protected by the Washington constitutional guarantees of liberty and privacy. Const. art. I, § 3; Const. art. I § 7.[11] Washington's Defense of Marriage Act ("DOMA")[12], by prohibiting State recognition of plaintiffs' relationships,

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[10] The relationships plaintiffs have formed are marriages in the sense of the private and internal meaning, despite the burdens and stigma placed on them by the State. They would also be marriages within the public and legal meaning of term, but for the unconstitutional denial of recognition. The State and Intervenor's "opposite sex" definition of marriage, and the argument premised thereon, is really nothing more than "the 'Trivial Pursuit' version of the due process 'name that liberty' game," as Professor Tribe has explained with inexorable logic and constitutional accuracy in Lawrence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1936 (2004).

[11] "No person shall be deprived of life, liberty, or property, without due process of law." Const. art. I, § 3; "No person shall be disturbed in his private affairs . . . without authority of law." Const. art. I § 7

impermissibly denies these couples the State's acknowledgement of their public expression of support and commitment. *See Turne v. Safley*, 482 U.S. 78, 95, 107 S. Ct. 2254, 2265, 96 L. Ed.2d 64, 83 (1987).

The Washington Constitution also protects the ability of citizens to form a civil marriage on "the same terms [as] equally belong to all citizens ...." Const. art. I, § 12.[13] By placing civilly licensed marriage outside the reach of those individuals who form that relationship with a person of the same sex,[14] the State has violated its obligation under Article 1 § 12.[15]

Plaintiffs call for this Court's enforcement of their rights to obtain the legal recognition of their relationships as required by *their* constitution. *State v. Coe,* 101 Wn.2d 364, 374, 679 P.2d 353 (1984) ("the

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[12] Marriage is a civil contract **between a male and a female** who have each attained the age of eighteen years, and who are otherwise capable." RCW 26.04.010 (1); Laws of 1998, ch. 1, § 2 (emphasis added). Marriages of same-sex couples lawfully created in other jurisdictions may not be recognized in Washington. RCW 26.04.020 (1) (c), (3).

[13] "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

[14] *Amici* use the term "sex" to refer to the biological sex of an individual. They use the term "gender" to refer not to biological sex, but to the social assignment of certain traits often perceived as linked with biological sex.

[15] The experience of the constituents of the King County Labor Council negotiating a "patchwork of [contractual] protections" for gay and lesbian economic and dignity rights caused it to conclude that "'separate is not equal,' civil unions do not equal civil marriage". *See* Resolution Supporting The Right To Civil Marriage For Same-Sex Couples, adopted 3/17/04, (last viewed 2/5/05 and available at HTTP://WWW.KCLC.ORG/LIST%20OF%20RESOLUTIONS.HTM#RESOLUTION%20SUPPORTING%20THE%20RIGHT%20TO%20CIVIL%20MARRIAGE%20FOR%20SAME-SEX%20COUPLES%20-%20ADOPTED%203/17/04)

protection of the fundamental rights ... was intended to be and remains a separate and important function of our state constitution and courts that is closely associated with our sovereignty.") Their constitution recognizes that liberty and equality are not simply ideals, but rather are experiences lived by individuals and by the body-politic in contexts that are both physical and temporal. Washington's constitutional law "adapt[s] our law and libertarian tradition to changing civilization...." *State v. Gunwall,* 106 Wn.2d 54, 59, 720 P.2d 808 (1986) *quoting The Role of a Bill of Rights in a Modern State Constitution,* 45 WASH. L. REV. 453 (1970).

Limiting the liberty and equality to settled examples of their historical application, or to those considered "traditional," does not comport with the maintenance of these vital principles as more than static pinnacles of liberty frozen in a nostalgic past. Only "frequent recurrence to fundamental principles [will ensure] the security of individual right and the perpetuity of free government." Const. art. I, § 32. Hence, application of constitutional principles to life as it is currently lived in Washington is this Court's task here.[16]

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[16] That task is one of state, not federal, constitutional law. The United States Supreme Court has not addressed the question of due process and privacy protection for same-sex couples to marry; thus, there is no federal precedent to examine in determining whether the Washington Constitution provides a broader protection of liberty and privacy. *State v. Gunwall,* 106 Wn.2d 54, 58, 720 P.2d 808 (1986). The federal constitution does not contain an equivalent to Washington's Equal Rights Amendment ("ERA"); therefore, the

II. CIVIL MARRIAGE COMPRISES PUBLIC COMMITMENT FOR A PERSONAL PURPOSE AS WELL AS ACKNOWLEGMENT BY THE STATE OF THAT COMMITMENT. THE CONSTITUION PROTECTS BOTH ASPECTS OF MARRIAGE.

A. Marriage Is A Matter Of Personal Autonomy And Intimacy.

The plaintiffs before the court are "barred by law from marrying the person of [their] choice and [to each plaintiff] that person ... may be irreplaceable." *Perez v. Sharp*, 32 Cal. 2d 711, 725, 198 P.2d 17 (1948). Certainly due process protects the choice to marry the person who is irreplaceable. *Id.* ("Human beings are [made] bereft of worth and dignity by a doctrine that would make them as interchangeable as trains.") Modern marriage is a "complex experience called being in love." *Stanard v. Bolin*, 88 Wn.2d 614, 620, 565 P.2d 94 (1977).[17] Justice Douglas eloquently captured its essence in *Griswold v. Connecticut*, 381 U.S. 479, 486, 85 S.Ct. 1678, 1682, 14 L. Ed.2d 510, 516 (1965):

ERA protections are considered under Washington's jurisprudence. *Amici* agree with, and adopt, the Andersen plaintiffs' analysis of the protections afforded them by the ERA. As to the Washington Privileges and Immunities Clause, *Amici* refer the Court to the *Gunwall* analysis set forth by the Castle plaintiffs, and adopt their arguments concerning its protections.

[17] In *Stanard*, the Court eliminated financial and social status damages from those that could be recovered through an action for breach of contract to marry because it recognized the vitality of the living institution of marriage: "Although it may have been that marriages were contracted for material reasons in 17th Century England, marriages today generally are not considered property transactions ...."

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

This "exclusive and permanent commitment of the marriage partners to one another ... is the *sine qua non* of civil marriage." *Goodridge v. Department of Health*, 440 Mass. 309, 332, 798 N.E.2d 94, 961 (2003).

Washington, as well as the United States, "afford[s] constitutional protection to personal decisions relating to marriage." *Lawrence v. Texas,* 539 U.S. 558, 574, 123 S. Ct. 2481-82, 2478, 156 L. Ed.2d 508 (2003) quoting *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L. Ed.2d 674 (1992). Central to that protection must be assurance of "the autonomy of the person in making" the selection of a marriage partner:

> "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."

Id. See also, O'Hartigan v. Department of Personnel, 118 Wn.2d 111, 117, 821 P.2d 44 (1991) ("The interest in autonomy [related to marriage, procreation, family relationships, child rearing and education] is

recognized as a fundamental right and is thus accorded the utmost constitutional protection."); *Voris v. Human Rights Comm'n*, 41 Wn. App. 283, 290, 704 P.2d 632 (1985) ("Implicit within the right to privacy is the right to govern one's personal and intimate relationships . . .")[18]

B. Civil Marriage Is Also A Social And Legal Act That Integrates Personal Autonomy And Intimacy Into An Ordered Society.

While the internal and personal meaning of marriage "may be an exercise of religious faith as well as an expression of personal dedication," *Turner,* 482 U.S. at 96, 107 S. Ct. at 2265, 96 L. Ed.2d at 83, marriage is also a public act by the couple, an announcement of their commitment to each other and of their intention to interact with their society as a unit. This right to act as, and be recognized as, a married couple, is a liberty "essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1042 (1923).

Once two people declare their commitment through the act of obtaining a marriage license, the State regulates the "legal duties and rights of the parties with respect to the marriage relationship . . . ." *Wash.*

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[18] Of course the autonomy in defining the personal meaning of marriage includes the religious meaning that each spouse ascribes to the marriage. These meanings are as varied as the religious beliefs (or agnosticism) of each spouse. *See* Castle Br. at 7 n. 9. Moreover, marriage as a religious institution, separate from civil marriage, is defined by the doctrine of the religion, not the State. Const. art. I, § 11.

Statewide Org. of Stepparents v. Smith, 85 Wn.2d 564, 569, 536 P.2d 1202 (1975). *See also*, 482 U.S. at 96, 107 S. Ct. at 2265, 96 L. Ed.2d at 83.[19] Thus, the law treats the couple as having legal "rights, duties and obligations" to one another and, as a married couple, toward their society. *In re Marriage of J.T.*, 77 Wn. App. at 363-64.[20] Hence, civil marriage is also a matter of social and legal acknowledgment that furthers the orderly integration of the intimate association within our civil society. *Meyer*, 262 U.S. at 399, 43 S. Ct. 625, 67 L. Ed. 1042. The legal recognition of the individual couple's decision to marry is "a vital personal[] right." *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 1824, 18 L.Ed.2d 1010 (1967).

C. Marriage Is No Longer The Site Of State Regulation Of Gender Hierarchy, Sexual Activity, Procreation Or Racial Purity. Rather, Its Essence Remains As A Privately Determined Intimate Relationship Integral To, And Recognized By, Civil Society.

At one time or another the state used its power to license and regulate marriage to enforce through law the beliefs "once thought necessary and proper [but which] in fact serve[d] only to oppress." *Lawrence*, 539 U.S. at 579, 123 S. Ct. 2481-82, 247, 156 L. Ed.2d 508.

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[19] The plaintiffs' briefs comprehensively detail the myriad legal benefits, privileges and obligations that the State affords to those who are civilly married and which carry great meaning for the lives of those married, and to those denied marriage, as well as to their families and communities.

[20] *See also, Maynard v. Hill*, 125 U.S. 190, 205, 8 S. Ct. 723, 726, 31 L. Ed. 654, 657 (1888) (couples who marry are "creating the most important relation in life").

As our understanding of liberty, privacy and equality has grown, many regulations of marriage once thought necessary and proper have been stripped from the law.

Marriage is no longer a property transaction,[21] is no longer denied to those whose progeny it was thought would pollute the "integrity" of the white race,[22] or to stigmatized groups such as prison inmates[23] or dead-beat dads.[24] Marriage, which once served to confine sexual activity and procreation within a cage of "natural" and sex-specific gender roles played out by a dominant male provider and his submissive and nurturing wife, is now, at least in its *de jure* sense, the site of sex and gender equality. Entering marriage no longer leads inexorably to entering parenthood, although it may should the couple choose to parent. Conception and pregnancy, whether in marriage or outside it, no longer result in legally sanctioned unemployment for a pregnant woman.[25] Marriage and parenthood for men are now understood, at least by the law, in the same

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[21] *Stanard*, 88 Wn.2d at 620

[22] *Loving*, 388 U.S. at 6, and n. 7, 11, n. 11, 1187 S.Ct. at 1821, 1823, 18 L.Ed.2d 1010; *compare* Wash. Terr. Laws of 1888 § 2380 *et seq.*, *with* Wash. Terr. Laws of 1866 p. 81.

[23] *Turner*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed.2d 64, 83.

[24] *Zablocki v. Redhail*, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978).

[25] *See, e.g., Guerra v. California Federal Savings and Loan*, 479 U.S. 272, 277, 107 S.Ct. 683, 687, 93 L.Ed.2d 613 (1987)

terms as they are understood for women.[26] State enforced workplace regulation no longer buttresses the gender hierarchy enforced by law in the traditional marriage.[27]

D. DOMA, Intended To "Protect" Marriage As An Institution Confined To A "Husband And Wife," Demeans Those Persons Whose Romantic And Sexual Attraction Is Towards Persons Of The Same Sex And Denies Them The Right To Choose Their Spouses Without Due Process Of Law.

As demonstrated above, civil marriage as a private relationship and as a legal institution has withstood the test of time by retaining its dual essence as a deeply personal "bilateral commitment" and as a legal institution "essential to the orderly pursuit of happiness . . . ." *Loving,* 388

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[26] *See e.g., Murray v. Murray,* 28 Wn. App. 187, 190, 622 P.2d 1288 (1981) (ending "tender years doctrine" favoring mothers in custody disputes); *Smith v. Smith,* 13 Wn. App. 381, 534 P.2d 1033 (1975) (mothers are not less obligated to support their children financially); RCW 26.09.002 (gender neutral "best interests of child" standard for custody matters); *Guard v. Jackson,* 132 Wn.2d 660, 667, 940 P.2d 642 (1997) (treating fathers' grief as equal with mothers' for purposes of the wrongful death statute).

[27] *Compare e.g., Bradwell v. State,* 16 Wall. 130, 21 L.Ed. 442 (1873 (barring women from the practice of law); *Goesaert v. Cleary,* 335 U.S. 464, 466, 69 S.Ct. 198, 93 L.Ed. 163 (1948) (prohibiting women from bartending work where no male relative provided protection from "moral and social problems" inherent in "bartending by women"); *Muller v. Oregon,* 208 U.S. 412, 419, n. 1, 422, 28 S.Ct. 324, 52 L.Ed. 551 (1908) (Court approved a state law limiting the hours that women could work for wages based on the related beliefs that (1) woman is, and should remain, "the center of home and family life," and (2) "a proper discharge of [a woman's] maternal functions--having in view not merely her own health, but the well-being of the race--justif[ies] legislation to protect her from the greed as well as the passion of man") with the Court's description of the current understanding that the law could no longer enforce discriminatory gender stereotypes premised upon the traditional understanding of the "natural" roles of men and women with regard to family and work in *Hibbs v. Nevada,* 538 U.S. 721, 736, 123 S.Ct. 1972, 1982, 155 L.Ed.2d 953(2003).

U.S. at 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010. It has done so by jettisoning outdated racist and patriarchal overlays on the essence of marriage, as new generation[s have invoked the concepts of privacy and liberty] in their own search for greater freedom." *Lawrence,* 539 U.S. at 579, 123 S. Ct. at 2484, 156 L. Ed.2d 508.

Civil marriage both reflects and perpetuates the meanings attached to it and to the roles of the marriage partners throughout public life. The meaning attached to DOMA's exclusion of gay and lesbian couples and enforced through law does not comport with the due process and privacy rights of those individuals. The Legislature declared the purpose of DOMA to be Washington's "historical commitment to the institution of marriage as a union between a man and a woman as husband wife and to protect that institution." Laws of 1998, ch. 1, § 1. This, however, was not the purpose asserted before this Court.

Rather, Appellants pin the statute's viability on the state interest in tradition, in procreation and in child rearing. The very illogic of the assertion that denying marriage to same-sex spouses would further procreation and child rearing in all marriages betrays the falsity of the assertion.[28]

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[28] Other courts considering their own state's restriction on access to marriage and the plaintiffs here have very thoroughly demonstrated the emptiness of these asserted

Rather the Court must take these arguments as a bait and switch tactic designed to distract the Court from the real objective of DOMA, encapsulated in the word "tradition."[29] That objective, clearly stated by the session law itself, was to "protect the institution" of marriage defined as between a "husband and wife." This objective clearly calls for the question: protection from what?

The answer is found in the legislative record that reflects the prejudices common to our day, just as race, sex and gender prejudices were common in years past. Heterosexism and homophobia have found their home in our Washington statute, just as racist doctrine and fear found a home in the marriage statutes of Virginia and other states, and just as sexism found a home in all United States marriage law until recent times.

The homophobia institutionalized in our marriage law legitimizes the denigration of same-sex couples and reinforces pejorative treatment of gays and lesbians throughout our civil society. This was understood at the

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purposes for the restriction on access to civil marriage. *See, Baker v. Vermont*, 170 Vt. 194, 252-253, 744 A.2d 864, 904-906 (1999); *Goodridge*, 440 Mass. at 335, 798 N.E.2d at 964. *Amici* do not replicate those exhaustive analyses here.

[29] Tellingly, the State relies on *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed.2d 772 (1997), to bolster its "traditional" definition of marriage argument. That argument is not only inconsistent with the relatively recent enactment of the definition challenged here, but the reliance on *Glucksberg* "beg[s] the question of government power by front-loading all of the reasons for government intervention in the threshold definition of the "liberty" at stake ...." Tribe, *supra* at 1930. This trick of logic is not helpful to the Court in evaluating the legitimacy of the State's exercise of power.

time DOMA was enacted. Its purpose was to deny legitimacy to homosexuals.[30] "The prime sponsor [of DOMA] said that lesbians and gays should be sent off to be reprogrammed as heterosexuals." CP 288-481. Why should lesbians and gays be "reprogrammed"? The answer given by a witness before the legislature was that homosexuality "bring[s] disease into the family." CP 288-481.

The palpable fear and loathing expressed towards same-sex marriage partners in justifying their banishment from civil acceptance[31] is not new in the annals of legal history. Strikingly similar views propped up bans on interracial marriage. During most of our history, "sexuality between the races was viewed as deviant and pornographic." Josephine Ross, *The Sexualization Of Difference: A Comparison Of Mixed-Race And Same-Gender Marriage*, 37 HARV. CIV. RIGHTS-CIV. LIBERTIES L. REV. 255, 259 (2002). Importantly for consideration here, the "interracial sex taboo" "served to make liaisons between white[s] and black[s] purely

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[30] "Homosexuality in its action is so repugnant to people, myself included . . . We don't understand how people could engage in it. So why do we want to legitimize it?" Lynda V. Mapes, *House Passes Ban on Gay Marriages — Backers Say Bill Defends 'God's Choice,'* SEATTLE TIMES, Feb. 5, 1998, quoting Representative Mike Sherstad available at http://archives.seattletimes.nwsource.com/cgi-bin/texis-cgi/web/vortex/display?slug=2732683&date=19980205&query=Sherstad (last viewed 11/22/04).

[31] Apparently banishment from civil society would be furthered by physical banishment if some legislators had their way. One legislator told the Legislature's only openly gay member "that we should take homosexuals and put them on a boat and ship them out of the country." Debate at 40 (February 4, 1998) (Rep. Ed Murray).

sexual and clandestine." *Id.* at 260. During the time of legal and social prohibition of mixed marriage, both white and black majorities felt that "sex across the color line [was] morally wrong and somehow sinful." *Id.* at 261 quoting Calvin C. Hernton, Sex And Racism In America, at xvi (1988). Thus, an "obsession with sexuality played a key role in maintaining the racist power imbalance and the continued second-class treatment of mixed race marriage and sexual relationships." *Id. Compare, Loving,* 388 U.S. at 11, 87 S.Ct. at 1823, 18 L.Ed.2d 1010.

Similarly here, obsession with conduct stigmatized because it is outlawed socially and legally, contributes to the second-class treatment of same-sex couples and to their demonization not only by some in the Washington legislature, but in our larger civil society.[32] In both cases, interracial and same-sex marriage, "intimacy [is] dismissed and only sexual desire and attraction" are recognized by "those that oppose full recognition for them." *Id.* at 279.[33] Here, DOMA dismisses the intimate relationship and the private and public commitment that same-sex couples make when they seek civil marriage. That legal dismissal encourages

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[32] *See generally* Ross, *supra*, for a careful and insightful explication of the parallels between the anti-miscegenation laws and the outlawing of same-sex marriage both from a social and constitutional perspective.

[33] *See also,* Tribe, *supra,* at 1906 "conflation of sexual act [considered deviant] with identity" in the case of same-sex sexual activity is "precisely the metonymic logic the majority sought to counter in *Lawrence*." (footnote omitted)

similar devaluation of the intimate relationships of gays and lesbians and of their families by their employers, their coworkers and their communities. For example, see the stories of Bat Kiett, Ron Wood and Cheryl Summerville as related by Tami Gold in *Making Out At Work* in OUT AT WORK 150-171.

DOMA's one dimensional reduction of same-sex relationships to sexual with the concomitant legal devaluation violates due process. DOMA demeans plaintiffs' relationships just as it would demean marriage to say that "marriage is simply about the right to have sexual intercourse." *Lawrence v. Texas,* 539 U.S. at 567, 123 S. Ct. at 2478, 156 L. Ed.2d at 518. The bonds cementing the plaintiff couples are the bonds of love, support, commitment and obligation. Washington's constitution allows them the right to State recognition of their enduring bonds.

III. THE EXPRESS SEX AND SEXUAL ORIENTATION DISCRIMINATION EMBODIED IN DOMA DOES NOT PASS MUSTER UNDER EITHER THE ERA OR THE PRIVILEGES AND IMMUNTIES CLAUSE.

The United States Supreme Court recognized the living meaning of state restrictions on marriage when it forthrightly stated in *Loving* that, "the racial classifications [in Virginia's marriage statute] must stand on their own justification, as measures designed to maintain White Supremacy." 388 U.S. at 11, 87 S.Ct. at 1823, 18 L.Ed.2d 1010. Here

too, the sex classification in Washington's DOMA must be seen for its transparent purpose, as a measure designed to express moral disapproval of gays and lesbians as a group and to maintain heterosexual supremacy and traditional gender hierarchies. These are not legitimate governmental interests. Classifications must not be "drawn for the purpose of disadvantaging the group burdened by the law." *Lawrence,* 539 U.S. at 583, 123 S. Ct. at 2486, 156 L. Ed.2d 508 (O'Connor, J., concurring) quoting *Romer v. Evans*, 517 U.S. 620, 633, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). *See also, Miguel v. Guess*, 112 Wn. App. 536, 553, 51 P.3d 89 (2002) ("A discriminatory classification that is based on prejudice or bias is not rational as a matter of law.") Therefore, no matter what level of scrutiny is applied to the same-sex classification in DOMA, to disadvantage gays and lesbians, "to deny this fundamental freedom on so unsupportable a basis as the ... classifications embodied in these statutes, classifications so directly subversive of the principle of equality ... is surely to deprive all the State's citizens of liberty without due process of law." *Loving,* 388 U.S. at 12, 87 S.Ct. at 1824, 18 L.Ed.2d 1010.

The classification is also express discrimination, here, on the basis or sex, as were the express racial categories held unconstitutional in *McLaughlin v. Florida*, 397 U.S. 184 (1964) and *Loving*, 388 U.S. at 12, 87 S.Ct. at 1824, 18 L.Ed.2d 1010. *See, also, Baehr v. Lewin*, 852 P.2d

44, 60, 68 (Haw. 1993) *superseded by* Haw. Const. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples."); *Goodridge*, 440 Mass. at 347, 798 N.E.2d 941, 971 (Mass. 2003) (Greaney, J., concurring) (finding that the state's marriage statutes "create a statutory classification based on the sex of the two people who wish to marry").

Finally, DOMA unconstitutionally furthers a discriminatory gender hierarchy linked to maintaining heterosexual dominance. *See* Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 187, 188-96 ("disapprobation of homosexual behavior is a reaction to the violation of gender norms").[34] That gender hierarchy is defined by gender roles assigned to biological sex that enhance the disempowerment and inequality of women and the stereotype of men as wanting in family feeling. It also leads to wrongheaded understandings of family and what supports family values.[35]

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[34] These gender roles were at play in the passage of DOMA. For example, Rabbi Daniel Lapin testified to the legislature that "marriage domesticates men and enhances the life of women [through] the polar chemistry of men and women[.]" CP 2880481 (Carnell Declaration, attached report at 48). Suzanne Cook similarly characterized men as uncivilized and sexually rapacious. CP 385-386. See also CP 356 (Washington Family Council, at 22, discussing male pedophiles and stepfathers as child molesters).

[35] Unions have long realized that they must "negotiate[e] for the needs of real families ... as opposed to mythic families with a male breadwinner and a wife-and-mother at home ...." *See*, Holcomb, *It All Begins With Coming Out* in OUT AT WORK , at 107-108,

Amici have experience with the ramifications of denial of marriage to gays and lesbians and with the denigration of those persons' humanity caused by discrimination against them sanctioned by the State. They understand from hard experience that where there is an "injury to one" there is "injury to all." Here plaintiffs present the Court with the opportunity to remedy an injury to all. As these labor organizations have learned from experience, democracy and strength will result from the recognition of the dignity of all persons and the legitimacy of all families.

CONCLUSION

This Court should declare RCW § 26.04.010(1) and RCW § 26.040.020(1)(c) unconstitutional and should order that marriage licenses be issued without regard to the biological sex of the applicants.

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Respectfully submitted,

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referencing as an example the Coalition of Labor Union Women's Bargaining for Family Benefits: A Union Member's Guide.